Orion Integrated Sdn Bhd v PFC Engineering Sdn Bhd

HIGH COURT (BINTULU) — SUIT NO BTU-22–17/10 OF 2011
STEPHEN CHUNG JC
15 JULY 2013

Civil Procedure — Writ — Recovery of monies — Contractual services for shipping, forwarding, inland transportation services and works — Recovery of monies inclusive of interest — Whether parties agreed to interest charged — Whether interest imposed unilaterally

The defendant had appointed the plaintiff as a contractor for the shipping, forwarding, inland transportation services and works in connection with the EPCC of the MNLG New Nitrogen Plant ('MNLG Rafflesia Project'). The services provided would be by way of purchase orders issued by the defendant to the plaintiff from time to time between 2008 and 2009. In the present claim, the plaintiff sought to recover RM1,063,726.05 inclusive of interest as at 30 June 2011 plus interest on the judgment sum at a rate of 1.5% per month. The defendant denied this and alleged that it had never agreed with the interest charged. It was further alleged that it had on numerous occasions informed the plaintiff verbally and through the plaintiff's audit confirmation that it objected to the imposition of the 1.5% interest on the amount owed to the plaintiff and that the interest of 1.5% per month was imposed unilaterally by the plaintiff. Pursuant to the plaintiff's statements of account issued to the defendant, the outstanding principal sums owing amounted to RM638,468.73 and the interest charges amounted to RM511,450.59 as at 31 March 2012. The issue that arose was whether the defendant was liable to pay the interest charged at 1.5% per month.

Held, allowing the plaintiff's claim with costs of RM18,000 to be paid by the defendant to the plaintiff:

During the series of correspondences of e-mails among the parties, there was no complaint nor any objection by the defendant to the interest charge of 1.5% per month. The defendant must then be estopped from challenging or objecting to the interest imposed in the invoices and statements of account. It was a well-established and accepted market practice to impose interest at 1.5% per month for the sales of goods and services involving invoices and statements of account and that these documents would collectively constitute a binding contract (see paras 19–20).

[Bahasa Malaysia summary

Defendan telah melantik plaintif sebagai kontraktor untuk pengangkutan, penghantaran, khidmat pengangkutan daratan dan kerja-kerja berhubung

dengan EPCC MNLG New Nitrogen Plant ('Projek MNLG Rafflesia'). Khidmat-khidmat yang diperuntukkan adalah melalui pesanan pembelian yang dikeluarkan oleh defendan kepada plaintif dari masa ke semasa di antara 2008 dan 2009. Dalam tuntutan ini, plaintif memohon untuk mendapatkan semula RM1,063,726.05 termasuk faedah pada 30 Jun 2011 tanbah faedah atas jumlah penghakiman pada kadar 1.5% sebulan. Defendan menafikan ini dan mendakwa bahawa ia tidak pernah bersetuju dengan faedah yang dicaj. Ia selanjutnya dihujahkan bahawa ia telah pada beberapa kali memberitahu plaintif secara lisan dan audit pengesahan plaintif bahawa ia membantah kepada pengenaan faedah sebanyak 1.5% atas jumlah yang kena dibayar kepada plaintif dan faedah sebanyak 1.5% sebulan dikenakan secara unilateral oleh plaintif. Berikutan kepada penyataan akaun plaintif yang dikeluarkan kepada defendan, jumlah utama yang kena dibayar merupakan sebanyak RM638,468.73 dan caj-caj faedah berjumlah sebanyak RM511,450.59 pada 31 Mac 2012. Isu yang berbangkit adalah sama ada defendan bertanggungjawab untuk membayar faedah yang dicaj pada 1.5% sebulan.

Diputuskan, membenarkan tuntutan plaintif dengan kos sebanyak RM18,000 dibayar oleh defenden kepada plaintif:

Semasa siri surat menyurat emel di antara pihak-pihak, tidak terdapat aduan atapun bantahan oleh defendan kepada caj faedah sebanyak 1.5% sebulan. Defendan oleh itu mesti diestop daripada mencabar atau membantah kepada faedah yang dikenakan dalam invois dan penyata akaun. Adalah dibuktikan dan amalan pasaran yang diterima untuk mengenakan faedah pada 1.5% sebulan untuk jualan barangan dan khidmat yang melibatkan invois dan penyata akaun dan bahawa dokumen-dokumen ini akan secara kolektif membentuk kontrak yang mengikat (lihat perenggan 19–20).]

Cases referred to

Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors [2007] 4 MLJ 772, HC (refd)

Emperee Industries Sdn Bhd v Genagco Sdn Bhd [1987] CLJ (Rep) 591, HC (refd)

Ka Wah Bank Ltd, The v Nadinusa Sdn Bhd & Anor [1998] 2 MLJ 350; [1998] 2 CLJ 486, FC (refd)

Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420, CA (refd)

Perangsang Dagang Sdn Bhd v Tanjung Teras Sdn Bhd & Ors [2007] MLJU 716; [2008] 2 CLJ 199, HC (refd)

Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd [1994] 2 MLJ 353, HC (refd)

Henry Ling (Ling & Wong) for the plaintiff.
Norida Sipek (Norida ak Sipek & Co) for the defendant.

Stephen Chung JC:

[1] By a letter of award dated 9 July 2008, the defendant appointed the plaintiff as a contractor for the shipping, forwarding, inland transportation services and works in connection with the EPCC of the MLNG New Nitrogen Plant ('MLNG Rafflesia Project') at Bintulu. The services provided would be by way of purchase orders issued by the defendant to the plaintiff from time to time between 2008 and 2009. The plaintiff accepted the letter of award on 15 July 2008 and provided the services as per the letter of award.

[2] The plaintiff filed a writ against the defendant to recover a sum of RM1,063,726.05 inclusive of interest as at 30 June 2011 plus interest on the judgment sum at a rate of 1.5% per month from the date of the writ. The defendant denied the plaintiff's claim and pleaded that it had never agreed with the interest charged at 1.5% per month after the 30 days' credit term. The defendant pleaded that it had on numerous occasions informed the plaintiff verbally and through the plaintiff's audit confirmation that it objected to the imposition of the 1.5% interest on the amount owed to the plaintiff and that the interest of 1.5% per month was imposed unilaterally by the plaintiff.

[3] The plaintiff and the defendant each called two witnesses for the trial. The parties agreed to the authenticity of the documents filed in the bundles of documents for the trial, the contents subject to proof and cross-examination.

[4] From the pleadings, evidence and the submissions of the parties, the defendant did not dispute and had agreed to pay the principal sums owing to the plaintiff but the defendant did not agree to pay the interest charged on the outstanding sums at 1.5% per month as provided in the invoices. Pursuant to the statements of account of the plaintiff issued to the defendant, the outstanding principal sums owing amounted to RM638,468.73 and the interest charges amounted to RM511,450.59 as at 31 March 2012. The issue for trial is whether the defendant is liable to pay the interest charged at 1.5% per month imposed by the plaintiff stated in the invoices issued to the defendant.

[5] DW1, the legal manager of the defendant, testified that the plaintiff and the defendant must be bound by the terms and conditions contained in the letter of award. She testified that the letter of award did not provide for any interest to be charged at 1.5% per month on all outstanding sums due. She said that the parties did not execute any agreement or any document to amend the contract or letter of award to provide for the interest charge at 1.5 % per month. She said that the defendant did not consent to the interest charged to the defendant stated in the invoices issued to the defendant by the plaintiff. It

was submitted that the invoices which imposed the interest on the defendant were not provided for in the letter of award, were not included in the terms and conditions of the letter of award and did not form part of the letter of award.

[6] DW2, the accounts executive of the defendant, testified and agreed that there was outstanding balance due and owing by the defendant to the plaintiff. She said that the defendant delayed in paying the amount owing to the plaintiff because of cash flow problem encountered by the defendant due to the delay in the payment received from MLNG Sdn Bhd.

[7] DW2 however also explained that she did not process the payments due to the plaintiff because the plaintiff did not attach any certificate of acceptance of the services rendered signed by the site representative of the defendant to signify that the works had been done or completed. It must be noted that this requirement was not pleaded in the defence nor was it raised as an issue in her witness statement marked as WSD2. It was only raised during her cross-examination. DW2 did not refer to any specific terms or conditions in the letter of award which required that certificate of acceptance must be signed by the site representative of the defendant. She also did not produce any document to support her testimony on this. Therefore there is no merit on this issue.

[8] PW1, the finance manager of the plaintiff since 2007, testified that he was in charge of the finance and accounts of the plaintiff including supervising the issue of invoices and statements of account for the services provided by the plaintiff to the defendant pursuant to the letter of award. PW1 testified that the supporting documents including the purchasing order, form of acceptance of purchasing order and shipping or delivery or transportation bill were annexed to the invoice issued for each transaction to the defendant. It was not in dispute that these documents were produced and exhibited in the plaintiff's bundle of documents.

[9] PW1 referred to 65 invoices issued to the defendant and exhibited in the plaintiff's bundle of documents ('BOD1') dated from 28 January 2009 until 3 November 2009. It was stated in the invoices that interest was charged at 1.5% per month on the unpaid amount after expiry of the 30 days credit term given.

[10] From 28 January 2009 until after 3 November 2009, the defendant did not send any letter or any correspondence to the plaintiff to object to the 1.5% interest per month imposed on the defendant provided in the invoices. The defendant did not exhibit any such letter or correspondence to complain or object to the interest charge at 1.5% per month.

[11] Clause 1 of the letter of award stated that the contract included the terms and conditions contained in all relevant documents and correspondence between the defendant and the plaintiff, which included but not limited to the documents mentioned in the followings:

> (1) The contract shall include the terms and conditions contained in all relevant documents and correspondences between us which shall include but not limited to the documents mentioned in the followings:
>
> (a) Your official proposal (Reference No: OSF/FC-08/1-801 dated 9.7.2008;
>
> (b) The attachments to this letter of award:
>
> (i) Unit rate for Sea Freight Charges — Attachment 1;
>
> (ii) Unit rate of Custom Clearance Inland Transportation and Port Clearance Charges—Attachment 2;
>
> (iii) Provisional Cost based on the agreed Unit Rates above are as attached in Attachment 3; and
>
> (iv) The FOB date for each shipment are as stated in Attachment 3.
>
> (c) The shipping cost stated in attachment 3 is provisional only, subject to final measurement of the cargo and actual Port of Export. The unit rate in attachment 1 and 2 however shall remain fixed and non-escalating, valid until 30.4.2009.

[12] The terms of payment in cl 9 of the letter of award provided as follows:

> (a) For all foreign transactions payment will be issued upon the presentation of delivery order ('DO') for the acceptance of goods at the port of embarkation;
>
> (b) For all local/domestic transactions will be on 30 days credit term from the date the delivery order ('DO') is accepted and forwarded together with the Orion invoicing.

[13] Clause 1 of the letter of award provided that the terms and conditions of the letter of award were contained in all relevant documents and correspondences which included but not limited to the documents listed in clause 1 of the letter of award. Clause 1 did not specifically exclude nor prohibit the invoices or the statements of accounts issued by the plaintiff to the defendant to form part of the terms and conditions of the contract or letter of award. In this case, the letter of award included and was constituted by the exchange of documents and correspondences between the parties. The invoices and statements of account issued to the defendant constituted a binding contract between the parties: *The Ka Wah Bank Ltd v Nadinusa Sdn Bhd & Anor* [1998] 2 MLJ 350; [1998] 2 CLJ 486, *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420.

[14] By an email dated 7 April 2010, addressed to Mr Zainurin, who was the chief financial officer of the defendant, PW1 requested Mr Zainurin to inform him the status of the payment to the plaintiff on the outstanding balance and reminded Mr Zainurin of the interest charges of 1.5% per month. By an email of the same day, Mr Zainurin explained the delay in the payment to the plaintiff due to MLNG Sdn Bhd in not expediting payment to the defendant under the project. Mr Zainurin in his email did not complain nor object to the interest charge of 1.5% per month although this was specifically referred to in the email from PW1. Mr Zainurin again did not complain nor object to the interest charge of 1.5% per month in his email dated 13 April 2010 to PW1.

[15] The evidence showed that Mr Zainurin had by an email dated 27 April 2010 informed PW1 that the defendant had remitted a sum of RM250,000 to the plaintiff towards payment of the balance owing. There was no complaint or any objection to the interest charge of 1.5% per month in his email. This payment of RM250,000 was reflected in the statement of account of the plaintiff dated 30 April 2010. This statement of account again provided that interest would be charged at 1.5% per month on 30 days past due invoices. Again, there was no complaint or objection by the defendant to the interest charge of 1.5% per month stated in the invoices and statements of account issued by the plaintiff to the defendant.

[16] The evidence showed that by another email dated 12 May 2010 addressed to PW1, Mr Zainurin again explained that due to funds not being available the defendant could not pay the balance owing to the plaintiff but hoped to resolve the issues in two to three months' time.

[17] This was followed by a letter dated 24 May 2010 addressed to PW1 by Mr Zainurin to thank the plaintiff for the understanding and patience while the defendant was resolving the payment issue. He sincerely hoped that the outstanding payments would be resolved before the year end.

[18] The defendant sent another letter dated 25 October 2010 to the plaintiff signed by its managing director to affirm and assure the plaintiff that the defendant would honour their commitment with the plaintiff to settle some of the outstanding amount and that the payment arrangement would be mutually agreed upon in due course.

[19] At all material times there was no complaint nor any objection by the defendant to the interest charge of 1.5 % per month and the defendant must be estopped from challenging or objecting to the interest imposed in the invoices and statements of account: *Emperee Industries Sdn Bhd v Genagco Sdn Bhd* [1987] CLJ (Rep) 591, *Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors* [2007] 4 MLJ 772.

[20] It has been held that it is a well-established and accepted market practice to impose interest at 1.5% per month for the sales of goods and services involving invoices and statements of account and that these documents would collectively constitute a binding contract: *Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353, *Perangsang Dagang Sdn Bhd v Tanjung Teras Sdn Bhd & Ors* [2007] MLJU 716; [2008] 2 CLJ 199.

[21] For the reasons given, judgment is entered for the plaintiff against the defendant in the sum of RM1,063,726.05 with interest thereon at the rate of 4%pa from the date of the judgment until full settlement. Costs of RM18,000 to be paid by the defendant to the plaintiff.

Plaintiff's claim allowed with costs of RM18,000 to be paid by defendant to plaintiff.

Reported by Afiq Mohamad Noor